

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030643-TP

In the Matter of:

PETITION OF VERIZON FLORIDA INC.  
(f/k/a GTE FLORIDA INC.) AGAINST  
TELEPORT COMMUNICATIONS GROUP, INC.  
AND TCG SOUTH FLORIDA FOR REVIEW OF  
DECISION BY THE AMERICAN ARBITRATION  
ASSOCIATION, IN ACCORDANCE WITH  
ATTACHMENT 1 SECTION 11.2(a) OF  
INTERCONNECTION AGREEMENT BETWEEN  
GTE FLORIDA INC. AND TCG SOUTH FLORIDA.



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PROCEEDINGS:           AGENDA CONFERENCE  
                          ITEM NO. 4

BEFORE:                 CHAIRMAN BRAULIO L. BAEZ  
                          COMMISSIONER J. TERRY DEASON  
                          COMMISSIONER LILA A. JABER  
                          COMMISSIONER RUDOLPH "RUDY" BRADLEY  
                          COMMISSIONER CHARLES M. DAVIDSON

DATE:                   Monday, May 3, 2004

PLACE:                  Betty Easley Conference Center  
                          Room 148  
                          4075 Esplanade Way  
                          Tallahassee, Florida

REPORTED BY:           LINDA BOLES, RPR  
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                          Official FPSC Reporters

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FPSC-COMMISSION OF

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## P R O C E E D I N G S

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CHAIRMAN BAEZ: Thank you, all. We are now on Item 4.

MS. BANKS: Commissioners, Item Number 4 is staff's recommendation filed in Docket Number 030643, petition of Verizon Florida against TCG for review of a decision by the AAA.

At the parties' request this item was deferred from the April 6th, 2004, Agenda conference. Staff's recommendation addresses the motion to dismiss filed by TCG and the response thereto filed by Verizon. Staff notes that a request for oral argument has been made by Verizon.

In Issue 1 staff is recommending that oral argument be granted to parties. Staff notes that parties are here and available to present argument, if the Commission so desires.

CHAIRMAN BAEZ: Commissioners, my apologies. I've just been told that we're having some difficulties with Commissioner Davidson's telephone connection, and if the parties will indulge us, if we can take five minutes to try and get that back up. I don't want to shut a Commissioner out from having his say. So we're going to recess for five brief minutes, and we'll come back with the rest of the presentations. Thank you.

(Recess taken.)

CHAIRMAN BAEZ: We'll go back on the record.

1 Commissioner Davidson, can you hear me?

2 COMMISSIONER DAVIDSON: Yes. Can you hear me?

3 CHAIRMAN BAEZ: I can hear you. A quick question,  
4 Commissioner, because I know you had sort of been shut out. Is  
5 there anything that you need to add or detract from any of the,  
6 any of the business we've done?

7 COMMISSIONER DAVIDSON: No. I voted in the majority  
8 with, on all the issues, but apparently that was not heard. So  
9 just for the benefit of the clerk, my vote is with the  
10 majority.

11 The only questions I had were on Item 3. Pardon?  
12 The only questions that I had were on Item 3, and those were  
13 asked in essence by Commissioner Jaber, and that resulting  
14 discussion answered all the issues that I had on that  
15 particular item.

16 CHAIRMAN BAEZ: So we're okay then? We can move on?

17 COMMISSIONER DAVIDSON: Yes, sir.

18 CHAIRMAN BAEZ: Excellent. Thank you. Where were  
19 we?

20 Ms. Banks, I don't think you all were done setting up  
21 the item, or were you?

22 MS. BANKS: We were. .

23 CHAIRMAN BAEZ: Okay.

24 MS. BANKS: We were, in fact, Commissioner, but I can  
25 reintroduce the item.

1 CHAIRMAN BAEZ: If you can go ahead and key it up for  
2 us again. Thank you.

3 MS. BANKS: Okay.

4 CHAIRMAN BAEZ: And I apologize to you all.

5 MS. BANKS: No problem. Item Number 4 is staff's  
6 recommendation in Docket Number 030643, which is the petition  
7 of Verizon against TCG for review of a decision by the American  
8 Arbitration Association.

9 At the parties' request, this item was deferred from  
10 the April 6th, 2004, Agenda conference. Staff's recommendation  
11 addresses a motion to dismiss filed by TCG and the response  
12 thereto filed by Verizon.

13 Staff notes that a request for oral argument has been  
14 made by Verizon. In Issue 1 staff is recommending that oral  
15 argument be granted to parties. Staff notes also that parties  
16 are here and available to present argument, if the Commission  
17 so desires.

18 CHAIRMAN BAEZ: Thank you, Ms. Banks. Commissioners,  
19 is there a motion on Issue 1 for oral argument?

20 COMMISSIONER DEASON: Move staff.

21 COMMISSIONER JABER: Second.

22 CHAIRMAN BAEZ: Motion and a second. All those in  
23 favor, say aye.

24 (Unanimous affirmative vote.)

25 CHAIRMAN BAEZ: Thank you, Commissioners. And we'll

1 stick to the ten minutes a side. And if we can have -- we're  
2 on the motion to dismiss, so, Mr. Hoffman, go ahead.

3 MR. HOFFMAN: Thank you, Mr. Chairman, and  
4 Commissioners.

5 Good morning. I'm Ken Hoffman; with me is Marsha  
6 Rule. We're here on behalf of Teleport Communications Group  
7 and TCG South Florida.

8 TCG and Verizon are parties to an interconnection  
9 agreement that was approved by the Commission but has since  
10 terminated. TCG filed a petition for arbitration arising out  
11 of an interconnection dispute in December of 2001. In the  
12 arbitration, Verizon filed a counterclaim. The issues were  
13 basically the same types of reciprocal compensation issues that  
14 the Commission has heard in contract disputes over the years.  
15 Both parties spent a substantial amount of time, resources and  
16 money on the litigation in the arbitration. The private  
17 arbitrator ultimately heard the claims and ruled in favor of  
18 TCG and issued a final order.

19 Verizon then filed what it has called an appeal or  
20 petition for review of the arbitrator's final order with the  
21 Commission. TCG has moved to dismiss that appeal, and that is  
22 what is before you this morning..

23 Commissioners, first I want to point you to three  
24 parts of the interconnection agreement that we think are  
25 relevant to our motion to dismiss. The first is Section 2.1,

1 which says that the negotiation and arbitration under the  
2 procedures provided herein shall be the exclusive remedy for  
3 all disputes between the parties arising out of this agreement  
4 or its breach.

5           The second is Section 11.1, which states that the  
6 arbitrator's decision shall be final and binding except as  
7 provided below. The below comes in Section 11.2, which  
8 provides that a decision of the arbitrator shall not be final  
9 if a party appeals the decision to the Commission, and the  
10 matter is within the jurisdiction of the Commission provided  
11 that the Commission agrees to hear the matter.

12           Commissioners, you should keep in mind that this  
13 language was part of the national agreement between Verizon and  
14 TCG, which essentially provided for situations in certain  
15 states where an appeal of a private arbitration order could be  
16 filed with the state commission if the state commission had  
17 that authority.

18           Verizon's position essentially is that under Section  
19 11.2, which was the third one that I referred to, there is that  
20 right of appeal, so long as the Commission agrees to hear the  
21 matter. TCG's position is that the Commission has no appellate  
22 review authority of any kind, and certainly there is no  
23 compelling policy reason for the Commission to revisit what is  
24 essentially a contract interpretation case between two  
25 carriers.

1           Commissioners, I want to begin my argument by  
2 emphasizing that TCG believes that Verizon's attempt to  
3 relitigate the case in front of you circumvents repeated  
4 admonitions that many parties have heard from the bench over  
5 the last few years requesting parties to work out their  
6 differences outside the Commission.

7           Here the parties agree to an arbitration process to  
8 work out this contract dispute. Leaving aside the whole legal  
9 issue of your authority, under the contract language the  
10 Commission is certainly not required to hear the appeal. TCG  
11 believes that the Commission would seriously undermine the goal  
12 of incenting parties to arbitrate and settle their differences  
13 outside the Commission if the Commission allows those efforts  
14 to be summarily discarded and authorizes an appellate process  
15 to relitigate the same issues.

16           Our primary legal argument revolves around a very  
17 basic fundamental principle of law that you have heard time and  
18 again, and that is that the Commission only has such power that  
19 is created and granted by the Legislature, and any attempt to  
20 exercise powers beyond those must be arrested.

21           Our position is that the Legislature has not granted  
22 this Commission any authority to hear an appeal of anything.  
23 The Commission has no appellate authority. Appellate review is  
24 a function that is limited to the courts under Article 5 of the  
25 Florida Constitution. Certainly nowhere in Chapter 364 has the



1 Legislature given the Commission the authority, appellate or  
2 otherwise, to vacate an order of a private arbitrator in  
3 conducting their proceeding, and that is what Verizon is  
4 requesting.

5           It's also a fundamental principle of law that neither  
6 TCG nor Verizon can confer jurisdiction on the Commission by  
7 entering into a contract. Again, that power is only with the  
8 Legislature. The Commission has no appellate authority, it has  
9 no appellate rules, it has no appellate standard of review.

10           If the Commission in this case were to enter a  
11 ruling --

12           COMMISSIONER DEASON: I'm sorry. Mr. Hoffman, if  
13 that is the case, what is, what's the purpose and the meaning  
14 of the language in the agreement itself which refers to the  
15 arbitrator's decision being final except if there is an appeal  
16 filed with the PSC and it's within the PSC's jurisdiction and  
17 the PSC agrees to hear it? What's the purpose of that language  
18 then?

19           MR. HOFFMAN: Commissioner, I think that the purpose  
20 of that is that was a nationwide template that would allow that  
21 type of appeal to proceed in states that authorize a state  
22 regulatory commission to hear appeals. And, of course, our  
23 position is that that type of authority doesn't exist in  
24 Florida for this Commission.

25           CHAIRMAN BAEZ: Commissioner Bradley, you had a

1 question.

2 COMMISSIONER BRADLEY: A question along that same  
3 line. And the information that, that I've been given by, by my  
4 staff is that one of the provisions of the agreement said that  
5 if there was a dispute, instead of coming to the PSC first, the  
6 parties would go to binding arbitration. That has happened.

7 A different provision, I've been informed, states  
8 that, it says that if, if the parties -- that the parties could  
9 appeal the decision of the arbitrator to the PSC if the PSC  
10 agrees to hear the appeal. So the binding arbitration becomes  
11 just the middle ground before they come to us in the first  
12 place. Am I -- if we choose to accept the appeal from the  
13 arbitrator. And I -- am I misunderstanding something that  
14 you're saying?

15 MR. HOFFMAN: Commissioner, you've got the language  
16 correct. That's what it says. That's what it says.

17 COMMISSIONER BRADLEY: Okay. Well, it didn't seem to  
18 me that you were saying the same thing, but I'm --

19 MR. HOFFMAN: Our point, Commissioner, is that the  
20 Commission does not have the legal authority from the  
21 Legislature to act as an appellate body, notwithstanding what  
22 the contract says. If these two parties put in a contract that  
23 the Commission would conduct a jury trial, only the Legislature  
24 could give the Commission that authority, no matter what the  
25 carriers say in a contract.

1 COMMISSIONER JABER: Mr. Hoffman --

2 MR. HOFFMAN: Yes, ma'am.

3 COMMISSIONER JABER: -- let me just solidify what I  
4 believe you're arguing just so that I can move forward in my  
5 own mind.

6 It is your argument that regardless of what the  
7 contract says, we don't have independent state authority to  
8 entertain an appeal.

9 MR. HOFFMAN: Yes, ma'am.

10 COMMISSIONER JABER: Okay. Now my question to you is  
11 could we go through the process of a hearing here or at the  
12 very least allow staff to get the information they say that  
13 they need to move us forward and reach the conclusion that you  
14 want us to reach today?

15 MR. HOFFMAN: Commissioner, I think you could do  
16 that. You could, you could gather more information, but we  
17 ultimately believe that you don't have the authority to conduct  
18 the appellate proceeding that Verizon has asked you to conduct.  
19 But you certainly can ask for more information.

20 CHAIRMAN BAEZ: Go ahead, Mr. Hoffman.

21 MR. HOFFMAN: Thank you, Mr. Chairman. What we are  
22 saying is that if the Commission were to take Verizon up on  
23 this appeal and the Commission were to purport to reverse the  
24 arbitrator's final order, what we're saying is that that order  
25 would have no effect on the final arbitration order. It would

1 still exist and it would still be effective. So whatever you  
2 do, if you were to take up this case, that final order of the  
3 arbitrator remains in effect because the Commission lacks the  
4 statutory authority to vacate it.

5 Now we point out in our motion that you've already  
6 ruled in a December 2002 order that the Commission lacks the  
7 authority to enforce a private arbitration order. In that  
8 situation which occurred during the midst of this particular  
9 arbitration, Verizon refused to comply with the discovery order  
10 of the arbitrator. So TCG came to the Commission and asked you  
11 to enforce that discovery order, and Verizon moved to dismiss  
12 that petition, and you agreed and you dismissed that petition.

13 Verizon here is attempting to distinguish that prior  
14 order with this particular situation. And Verizon argues that  
15 the Commission did not have jurisdiction in the prior situation  
16 because TCG's petition was directed to the arbitrator's order  
17 requiring the production of discovery, while here, according to  
18 Verizon, this is a petition that directs itself to the  
19 interpretation of interconnection terms and conditions, and  
20 that you have that authority, and this is Verizon's position,  
21 under Section 364.162.

22 And what I say to you, Commissioners, is that I don't  
23 quarrel with the fact that you have the authority to arbitrate  
24 interconnection disputes, but that is not what has currently  
25 been filed before you. What's before you is a petition to

1 review a private arbitrator's decision, and 364.162 does not  
2 authorize you to do that. And even in that order in that prior  
3 situation involving TCG and Verizon, you emphasized at the end  
4 of that order that you encourage the continued use of  
5 arbitration and negotiation.

6 We think that the applicable precedent for this case,  
7 which Verizon has not cited, is a December 2001 order involving  
8 XO Florida and Verizon. It's Order Number PSC012509. And  
9 there you granted Verizon's motion to dismiss an  
10 interconnection agreement complaint that XO filed because the  
11 parties had an arbitration provision in their agreement. That  
12 agreement, which is very much like this agreement, and I'd like  
13 to just read you a brief passage from it, said, quote, the  
14 parties agree to use the following alternative dispute  
15 resolution procedures as their sole remedy with respect to any  
16 controversy or claim arising out of or relating to the  
17 interpretation of this agreement or its breach. Nothing in  
18 this subsection, however, shall divest the Commission, the FCC  
19 or state or federal courts of any jurisdiction they otherwise  
20 have over matters of public policy or interpretation of and  
21 compliance with state or federal law, and either party may seek  
22 redress from the Commission, the FCC or state or federal court  
23 to resolve such matters. So that agreement, like this  
24 agreement, left a possible opening for a party to try to get in  
25 front of the Commission.

1           Again, you dismissed XO Florida's complaint. And  
2 what did you say? You said, quote, we do not believe that the  
3 dispute in this docket involves a matter of public policy or  
4 interpretation of and compliance with state or federal law. It  
5 is rather a difference in interpretation of a contract. In a  
6 very loose and general sense, every matter for which we are  
7 responsible falls under the umbrella of some state or federal  
8 law. That fact, however, does not diminish the rights of  
9 parties to agree and contract regarding matters which do not  
10 rise to a level which requires intervention by us to protect a  
11 greater public interest. We find that the dispute which is the  
12 subject of this docket does not rise to that level. Close  
13 quote. That also, like this, was an interconnection agreement  
14 dispute. We think the same rationale applies here. This is a  
15 contract interpretation case; it is not a public policy case.

16           I want to touch on two points in Verizon's response,  
17 Mr. Chairman.

18           COMMISSIONER BRADLEY: Mr. Chair.

19           CHAIRMAN BAEZ: Commissioner Bradley.

20           COMMISSIONER BRADLEY: Just one question. Well, if  
21 the Public Service Commission does not have the statutory  
22 authority to deal with a disagreement, my question is this:  
23 Were you all aware of that when you did the agreement?

24           MR. HOFFMAN: Yes, sir. We adopted -- this was an  
25 existing agreement that had been arbitrated before the

1 Commission by Verizon's predecessor GTE and AT&T, and TCG opted  
2 into this agreement.

3 COMMISSIONER BRADLEY: So when the agreement was  
4 done, it was clear to you, clear to you that if there was a  
5 disagreement, that the Public Service Commission would not have  
6 the statutory authority to deal with a disagreement.

7 MR. HOFFMAN: Correct. Because --

8 COMMISSIONER BRADLEY: Okay. My next question is  
9 this: What was the rationale then behind asking the Public  
10 Service Commission, if that's true, to allow you all to, to  
11 arbitrate the occurrence?

12 MR. HOFFMAN: I can't answer that, Commissioner,  
13 because that was something that was negotiated between AT&T and  
14 GTE. It wasn't even an issue that the Commission arbitrated.  
15 It became part of that agreement. So why the party, the  
16 original two parties to the contract agreed to that, I'm not in  
17 a position to say. All I can say would be that TCG took that  
18 agreement as it found it when it decided to adopt it, and we  
19 represent TCG.

20 CHAIRMAN BAEZ: No more questions?

21 COMMISSIONER BRADLEY: No.

22 COMMISSIONER DAVIDSON: Chairman?

23 CHAIRMAN BAEZ: Go ahead, Commissioner Davidson.

24 COMMISSIONER DAVIDSON: Thank you, Chairman.

25 Mr. Hoffman, do you agree that under paragraph

1 11.2 an award or a decision, an arbitrator's decision is not  
2 final if -- strike that.

3 Let me ask, does, does your argument turn upon how we  
4 define, quote, the matter within the jurisdiction of the  
5 Commission, close quote? Meaning if we define that phrase, if  
6 we define the matter to mean interconnection agreements as  
7 opposed to review of arbitral awards, that affects the outcome  
8 of your argument?

9 MR. HOFFMAN: No. My argument, Commissioner  
10 Davidson, focuses on what is actually in front of you, which is  
11 a petition to review a private arbitration order. So my  
12 argument is that the Commission does not have that legal  
13 authority because it has not been granted by the Legislature.

14 And then secondarily, if the Commission disagrees  
15 with me about that, then my argument is that the Commission  
16 should not accept this case because it does not implicate any  
17 public policy. It's simply a case that involves two carriers'  
18 different interpretations of a contract.

19 COMMISSIONER DAVIDSON: So even if the, even if the  
20 contract language specifically provided that a party, an award  
21 should not be final if a party appeals the decision to the  
22 Commission or the FCC, and if the language provided  
23 interconnection issues are within the jurisdiction of the  
24 Commission, which we know they are, that wouldn't matter. Your  
25 argument is first and foremost just that we lack the statutory



1 authority to review arbitral awards.

2 MR. HOFFMAN: Yes, sir.

3 COMMISSIONER DAVIDSON: All right. Thank you.

4 CHAIRMAN BAEZ: Thank you, Commissioner.

5 COMMISSIONER BRADLEY: Mr. Chairman.

6 CHAIRMAN BAEZ: Go ahead, Commissioner Bradley.

7 COMMISSIONER BRADLEY: And Commissioner Davidson was,  
8 at the beginning of his question, I think beginning to ask the  
9 question I, that's still unclear in my mind.

10 What determines if an arbitrator's decision is final?  
11 And I -- that may not be a question for you. That may be a  
12 question for staff to answer.

13 My question is was the arbitrator's decision final  
14 and the parties disagreed -- did they not agree with the  
15 decision that was rendered? Was it a final decision?

16 MS. BANKS: Commissioner Bradley, if I understand  
17 your question to be whether or not a AAA decision is considered  
18 to be final -- by its very nature, arbitrations are considered  
19 to be final. And I don't know if that gets to your question.

20 COMMISSIONER DAVIDSON: Commissioner, I think -- this  
21 is Commissioner Davidson. I think under most rules the  
22 decision becomes final at the time it's issued by the  
23 arbitrators and, you know, signed and deposited with the, the,  
24 the AAA or sent to the parties. So it actually becomes, quote,  
25 unquote, final at sort of a time certain, often when it's

1 signed or transmitted. But I think, if that was Ms. Banks,  
2 that was correct. Once it's issued, it for the most part is,  
3 is final, subject to any specific provisions that the parties  
4 may have included regarding finality, such as the one here.

5 CHAIRMAN BAEZ: Let me jump in here really quick with  
6 a question.

7 Mr. Hoffman, it's not your position that there is no,  
8 quote, unquote, appeals process available under the arbitration  
9 sections; correct?

10 MR. HOFFMAN: Before the Commission, correct.

11 CHAIRMAN BAEZ: Well, I'm not talking about the  
12 Commission. I'm talking about in an absolute sense. And  
13 perhaps I'm getting a little bit farther abroad of what we have  
14 in front of us, but I want to understand exactly whether,  
15 whether it's your contention that the arbitrator's award is, as  
16 we've been discussing or the Commissioners have been having  
17 questions about, is final without an appeal, or you're not,  
18 you're not arguing that there is no appellate process. Without  
19 regard for the moment as to what the proper forum is and where,  
20 where that process lies, there is some appellate process. Does  
21 your client at least agree with that?

22 MR. HOFFMAN: Mr. Chairman, yes. We, we -- our  
23 position is that it is final and that there can be an appellate  
24 process under certain situations that are laid out in  
25 Chapter 682 of the Florida Statutes which pertains to

1 arbitrations.

2 COMMISSIONER BRADLEY: Mr. Chairman.

3 CHAIRMAN BAEZ: Yes.

4 COMMISSIONER BRADLEY: And I'm, I'm still trying to  
5 figure out why, why the parties would agree to insert the  
6 language that gives the PSC the authority to, to hear an  
7 appeal, knowing that in their opinion we didn't have the  
8 statutory authority. Was this an attempt by them to -- I mean,  
9 what was the rationale behind --

10 MR. HOFFMAN: As I understand it, Commissioner  
11 Bradley --

12 COMMISSIONER BRADLEY: -- allowing such language to  
13 be included as, as a clause in the contract for arbitration if,  
14 in fact, that is not the case, if, in fact, we don't have the  
15 statutory authority? I'm just trying to figure out why, why  
16 the parties would insert, I mean, language that this authority  
17 does not -- I mean, that this Commission does not have the  
18 authority to deal with if there's a dispute as to what the  
19 arbitrator's decision is. And now your argument is that we  
20 don't have the statutory authority to deal with a dispute that  
21 has occurred as a result of the arbitrator's decision.

22 MR. HOFFMAN: My understanding again, Commissioner  
23 Bradley, and I don't think that Verizon would disagree with  
24 this, is that this part of the agreement was part of a national  
25 template and that it applied in all states between Verizon and

1 TCG, and that perhaps there are some states where a state  
2 commission has appellate authority to review a private  
3 arbitrator order. So in those states this provision would kick  
4 in. My argument is that in this state it would not because the  
5 Commission does not have that authority.

6 COMMISSIONER JABER: Mr. Hoffman, I think -- if I  
7 could, Commissioner Bradley, follow up on your question.

8 COMMISSIONER BRADLEY: Uh-huh.

9 COMMISSIONER JABER: Commissioner Bradley's point is  
10 well-taken. When you opted into the agreement, when you chose  
11 to opt in, whether you used the pick and choose rule under the  
12 FCC process or not, you knowingly opted to bring yourselves  
13 under the umbrella of the provision that had that language in  
14 it.

15 MR. HOFFMAN: I think that's right.

16 COMMISSIONER JABER: Okay. Now let's set that aside  
17 for a moment. You knowingly opted into that provision. That  
18 said, let's set it aside.

19 Your argument is regardless of what the contract says  
20 and what we opted in knowingly, we don't think you have  
21 independent state authority.

22 MR. HOFFMAN: Yes, ma'am.

23 COMMISSIONER JABER: Okay. Here is my problem with  
24 what you're arguing today. It is not unlike what staff is  
25 recommending. Staff recommends that we determine what the

1 legal policy factual issues are before we decide to move this  
2 case forward. They say this is a case of first impression, we  
3 don't know enough, we need more. They've actually preserved  
4 your opportunity to give us the legal argument. The record  
5 doesn't pick up nodding your head, so is that a yes?

6 MR. HOFFMAN: Well, I didn't, I didn't know if you  
7 were finished.

8 COMMISSIONER JABER: I'm finished.

9 MR. HOFFMAN: Okay. The only difference,  
10 Commissioner Jaber, is that staff's position in its  
11 recommendation is that the Commission has the legal authority  
12 to hear this appeal, and our position is that the Commission  
13 does not have that authority.

14 COMMISSIONER JABER: Well, maybe I misunderstand Page  
15 16, Mr. Hoffman, and this is your opportunity to straighten me  
16 out.

17 Page 16, on this question of first impression, the  
18 motion and response do not provide sufficient information for  
19 staff to recommend whether the Commission should exercise its  
20 discretion to agree to hear an appeal under the third prong.

21 MR. HOFFMAN: My understanding of the recommendation,  
22 and I'm sure staff will correct me if I'm wrong, is that staff  
23 believes the Commission has the legal authority to hear this  
24 petition. That was my understanding.

25 COMMISSIONER JABER: Mr. Hoffman, I will again ask

1 staff that question. And we've interrupted you a lot, so I  
2 will not interrupt you any further. I just needed that  
3 clarification.

4 MR. HOFFMAN: Yes, ma'am.

5 Mr. Chairman, just a few more comments here. Just  
6 let me touch on a couple of pieces of Verizon's response. They  
7 argue in there that their interpretation of the agreement is  
8 the only reasonable interpretation and that this arbitration  
9 proceeding provides an opportunity for the parties to narrow  
10 the issues and eliminate the need for further discovery before  
11 the Commission. And our response to that is that we did not  
12 engage in the arbitration process and expend the time and money  
13 as some sort of prolonged Issue ID. We think that their  
14 interpretation would serve to prolong this litigation, which,  
15 again, started back in December of 2001, and we don't think  
16 that that is, is the type of message the Commission should send  
17 when it approves an interconnection agreement with arbitration  
18 provisions.

19 Verizon also attempts to distinguish the prior order  
20 that I had mentioned briefly involving these same two parties  
21 where the Commission dismissed TCG's complaint. Verizon argues  
22 that TCG's complaint in that last case was inappropriate  
23 because the Commission has no general authority to enforce the  
24 orders of a private arbitrator, and our position is that that  
25 principle applies equally here. So borrowing Verizon's words,

1 there is no general authority to reverse or vacate the orders  
2 of a private arbitrator.

3 Mr. Chairman, I just want to emphasize again that if  
4 the Commission were to determine that it has jurisdiction,  
5 then, of course, as Commissioner Jaber has expounded on, you  
6 still must agree to hear the case. And we urge you not to do  
7 that. As I've previously argued, we think it sends the wrong  
8 signal and can make the arbitration process essentially a waste  
9 of time and resources if one party unilaterally chooses to  
10 relitigate the case.

11 This case is a contract interpretation case, it  
12 involves a dispute between two parties regarding their  
13 competing interpretations over what the language in the  
14 contract means, it did not and could not reflect the  
15 prospective policy of the Commission, and our position is that  
16 there's no compelling policy reason to prolong this litigation.

17 So to sum it up, we are asking that the Commission  
18 grant TCG's motion to dismiss. We believe that you lack the  
19 legal authority to hear this appeal. If you disagree with us  
20 on that, we think this agreement is really a contract dispute  
21 between two carriers, and that by denying our motion to  
22 dismiss, you would be discouraging resolution of  
23 interconnection disputes through the arbitration process.

24 That concludes my remarks, Mr. Chairman. I'd be  
25 happy to answer any questions.

1           CHAIRMAN BAEZ: Thank you, Mr. Hoffman. And I just  
2 want to -- the representative for Verizon, I'm sorry. I'm  
3 sorry.

4           MR. PANNER: Aaron Panner for Verizon.

5           CHAIRMAN BAEZ: Mr. Panner?

6           MR. PANNER: Yes.

7           CHAIRMAN BAEZ: Here's the dilemma that I find myself  
8 in. We have a small matter of a reconsideration on a Special  
9 Agenda. I don't want to, I don't want to get you started on  
10 your -- we've got to start it up at 11:00, and we've got some  
11 setup time. So I don't want to get you started on your  
12 rebuttal and then have to cut you off. So I, I apologize, but  
13 you're going to have to indulge us on this one. We're going to  
14 have to take it up after, after Special Agenda.

15          MR. PANNER: Okay. Thank you, Chairman.

16          CHAIRMAN BAEZ: It's the only option that's available  
17 to us. But I do want to try and get Mr. Hoffman out.  
18 Commissioners, if it's your pleasure, if you do have any  
19 additional questions of Mr. Hoffman, probably now is a good  
20 time so that we can give our staff ten minutes or so to get the  
21 Special Agenda set up.

22          COMMISSIONER JABER: I have a couple on the order.

23          CHAIRMAN BAEZ: Do you have a couple? Okay.

24          COMMISSIONER JABER: Just a couple on the order that  
25 Mr. Hoffman cited.



1 The XO case, what year was that?

2 MR. HOFFMAN: December 21, 2001, Commissioner Jaber.

3 COMMISSIONER JABER: Was it a panel or a full  
4 Commission?

5 MR. HOFFMAN: Panel.

6 COMMISSIONER JABER: Who was on the panel?

7 MR. HOFFMAN: Commissioner Jacobs, Deason and Baez.

8 COMMISSIONER JABER: Okay. Thank you.

9 CHAIRMAN BAEZ: Commissioners, any other questions at  
10 this point? Otherwise, we'll recess.

11 COMMISSIONER DAVIDSON: Chairman, I have just one  
12 question for staff.

13 CHAIRMAN BAEZ: Commissioner Davidson, if you can  
14 just hold.

15 Commissioner Bradley, did you have a question? I  
16 guess he just busted in ahead of you.

17 COMMISSIONER BRADLEY: No. I was, I was going to  
18 request that staff, just put staff on the alert that it  
19 probably was unfair for me just to ask Mr. Hoffman those  
20 questions. I would like for staff to consider a response.

21 CHAIRMAN BAEZ: Okay.

22 COMMISSIONER BRADLEY: Mr. Hoffman, I wasn't trying  
23 to put you on the spot. I probably should have been asking the  
24 staff those questions anyhow.

25 CHAIRMAN BAEZ: And, Commissioner Davidson, you had a

1 question. I'm sorry.

2 COMMISSIONER DAVIDSON: Yes. Thank you, Chairman.

3 The one question of staff: Was Mr. Hoffman correct in stating  
4 that staff is assuming in its, and I'm referring to the Page 16  
5 discussion, that staff is assuming the Commission has  
6 jurisdiction to hear this matter in the first instance?

7 MS. BANKS: That's correct, Commissioner Davidson.

8 COMMISSIONER DAVIDSON: Thank you. That's all,  
9 Chairman, I have.

10 CHAIRMAN BAEZ: All right. If there's no further  
11 questions then, we're going to go ahead and recess to set up  
12 Special Agenda. And we'll continue with Verizon's rebuttal  
13 comments after Special Agenda is concluded.

14 Thank you, gentlemen and ladies.

15 (Recess taken.)

16 CHAIRMAN BAEZ: We'll go back on the record.

17 Mr. Melson, how did we do? We got in under the wire? All  
18 right.

19 Mr. Panner, we were at that point where you were  
20 about to start your comments. And I want to thank you all for  
21 indulging us. Go ahead, sir.

22 MR. PANNER: Thank you, Chairman and Commissioners,  
23 good morning -- or I guess good afternoon at this point.

24 Verizon supports the staff's recommendation. There  
25 are really two separate issues, and I think that what TCG has

1 done in this argument is really confused them, and I think that  
2 might be -- I'd like to try to address some of that confusion.

3           The first issue is, what did the parties agree in the  
4 agreement? If the parties had said in the agreement there will  
5 be binding arbitration, no review, that would obviously be a  
6 permissible agreement, as the Commission has held, and there  
7 would be nothing further to do, but that's not what the parties  
8 agreed, and indeed, TCG does not say that that's what the  
9 parties agreed. The parties clearly agreed that arbitration  
10 decisions would be subject to review by this Commission if the  
11 Commission has jurisdiction and chooses to exercise it. So the  
12 contractual issue -- all of Mr. Hoffman's comments about how  
13 that's not a good way to run a railroad are completely beside  
14 the point. That's what the parties agreed to. Indeed,  
15 Mr. Hoffman acknowledged that, that if this Commission has  
16 jurisdiction, the parties understood when they signed this  
17 agreement that there would be a possibility of appeal of an  
18 arbitration decision, and plainly that's not a wasteful thing.  
19 All of the discovery that's taken place, that's done, it  
20 doesn't need to be duplicated at all.

21           What happens now is there's a record, there's a  
22 decision, and this Commission will evaluate that record and the  
23 legal determinations of the arbitrator below exercising its  
24 expertise and authority over the issue. So as far as the  
25 contractual issue, that's quite clear. It's really not

1 disputed. This case can proceed if the Commission has  
2 jurisdiction. So the only issue is, is the jurisdictional one.  
3 Does the Commission have the authority to hear a case of this  
4 type? And that question is directly addressed by the statute.  
5 Section 364.162 says that the Commission has jurisdiction with  
6 respect to any dispute -- it's worded very broadly -- any  
7 dispute regarding interpretation of interconnection or resale  
8 terms and conditions. Now, there's no dispute that this is a  
9 dispute about interconnection terms and conditions, and  
10 therefore, under the explicit terms of the statute, the  
11 Commission has this authority and jurisdiction to hear the  
12 case.

13           We acknowledge that the staff talked about that there  
14 would -- it might be appropriate to have separate briefing of  
15 which issues are appropriate to hear, whether there's a need  
16 for the Commission to weigh in. I'd point out, this is a  
17 new -- this is an agreement that this Commission has never  
18 looked at. The terms are different, the arguments of the  
19 parties are different, and the circumstances at issue are  
20 different from ones that have ever been heard before with  
21 respect to the issue of ISP-bound traffic. And there's a  
22 separate issue in this case, and I'm not aware this Commission  
23 has ever ruled on it in the context of an interconnection  
24 agreement dispute regarding the treatment of virtual FX  
25 traffic. This Commission ruled in 2002 that VFX traffic is not

1 local traffic, not subject to reciprocal compensation. The  
2 arbitrator below reached the opposite decision. So those are  
3 issues that this Commission should reach. Certainly it would  
4 be possible for the parties to file separate papers addressing  
5 which issues are important to hear, and then the Commission  
6 could -- you know, it'd sort of be almost a process of  
7 certiorari where the Commission would look at the issues that  
8 are proposed and decide which ones to hear.

9 I guess Verizon would suggest it would probably be  
10 most efficient if the parties just had an opportunity to go  
11 ahead and present the issues for decision to the Commission  
12 with regard to the challenges to the arbitrator's decision  
13 below, and then the Commission would have an opportunity to  
14 look at this and say, you know, with respect to this dispute  
15 over this interconnection agreement, you know, is this right or  
16 wrong and render a decision. That's clearly what the parties  
17 contemplated in the agreement. The Legislature gave you  
18 jurisdiction to do that in Section 162, and, you know, Verizon  
19 suggests that you should proceed to exercise that jurisdiction  
20 in this case.

21 CHAIRMAN BAEZ: Thank you, Mr. Panner. I have a  
22 quick question. Do you -- never mind. I'll get back to it.

23 Commissioners, some questions for Mr. Panner, if any?

24 COMMISSIONER BRADLEY: Yes.

25 CHAIRMAN BAEZ: Go ahead, Commissioner Bradley.

1           COMMISSIONER BRADLEY: I'm still kind of hung up on  
2 my duck argument, and I'll explain what my duck argument is.  
3 Define an arbitration and arbitrator and the fact that the  
4 parties, in fact, agreed that arbitration should serve as a  
5 remedy, but there's some dispute as to what our statutory  
6 authority is and that has been increased further by the  
7 argument that Verizon's attorney just presented. My curiosity  
8 has been piqued. I'd like to ask a couple of questions.

9           CHAIRMAN BAEZ: Absolutely.

10          COMMISSIONER BRADLEY: Mr. Hoffman, which states have  
11 this authority that Florida does not have?

12          MR. HOFFMAN: I don't know.

13          COMMISSIONER BRADLEY: Have you had the opportunity  
14 to research this matter?

15          MR. HOFFMAN: I probably had the opportunity,  
16 Commissioner Bradley, but I did not research that issue.

17          COMMISSIONER BRADLEY: I'll leave that alone. And my  
18 duck argument is this. You know, sometimes what we think looks  
19 like a duck maybe is a goose. I'm just wondering if this  
20 agreement is not a duck but a goose. It's being called an  
21 arbitration, but it was maybe something else. And the reason  
22 why I'm asking that question is because I'm just still hung up  
23 on this assertion that the parties agreed under our advice to  
24 seek arbitration and agreed, in my opinion, that if arbitration  
25 did not work, to remand it back to us. But now the argument is

1 that we don't have the statutory authority. And I'm just  
2 trying to -- I'm wrestling with jurisdiction and trying to  
3 decide what there is that we really did because if we don't  
4 have the jurisdiction to remand to an arbitrator -- do you all  
5 understand what I'm getting at? And I'm just trying to sort  
6 through this issue.

7 CHAIRMAN BAEZ: You raise a good point, I think. And  
8 I had lost my train of thought earlier, and maybe if I can ask  
9 a clarifying question --

10 COMMISSIONER BRADLEY: Yes.

11 CHAIRMAN BAEZ: -- maybe that will get something teed  
12 up.

13 Mr. Panner, Mr. Hoffman has characterized the  
14 arbitration language as -- I think it's 11.2, the one that  
15 actually contemplates an appeal, actually has the word as part  
16 of the clause -- as part of the language, he's characterized it  
17 as part of what was a global agreement, something that applied  
18 to all Verizon territories. It wasn't necessarily contemplated  
19 to be Florida-specific; hence, the creation of some appellate  
20 process, and I don't want to put words into Mr. Hoffman's  
21 mouth, but certainly without any specificity as to whether  
22 there even existed particular authority to whatever body  
23 entertained that appeal. Do you agree with that  
24 characterization, that it was part of some global agreement,  
25 that it was something that was much bigger than Florida?

1           MR. PANNER: Well, I think it's probably fair that  
2 the agreement was negotiated on a more-than-one-state basis.  
3 But I think the reason for the cautious language is -- and I  
4 think that Verizon has explained this in its briefing -- there  
5 was uncertainty at the time over whether state commissions  
6 would have the authority either under state or federal law to  
7 hear cases about the -- about enforcement or interpretation of  
8 existing agreements. In other words, the federal statute is  
9 very clear under Section 252 that this Commission has the  
10 authority to arbitrate and approve agreements, but then there  
11 was a question about what happens once they're approved. How  
12 do they get enforced? And what has been decided under both  
13 Florida law and federal law is that this Commission does have  
14 the authority to hear post-approval disputes. That's sort of  
15 water over the dam that was not clear at the time the parties  
16 negotiated this agreement.

17           So what the parties said was, we're going to have an  
18 arbitration process. And I think that, you know, maybe it gets  
19 to some extent to Commissioner Bradley's question, which is,  
20 you know, what was the idea behind this? And I think the idea  
21 is pretty clear that the parties anticipated that they would go  
22 to a private arbitrator in the first instance, you know,  
23 probably with the hope that it would be more expeditious and  
24 less expensive than going through a commission process, and  
25 obviously there's a benefit to the Commission as well, but that



1 at the end of that process there would be the possibility of  
2 going to the Commission for a decision on issues that remained  
3 in dispute if the Commission was properly found to have that  
4 authority. Now, that's a perfectly reasonable way for the  
5 parties to have agreed to proceed, and indeed, you know, the  
6 parties may be more reluctant to go to an arbitration in the  
7 first instance if they don't think that they're going to get  
8 effective review by this Commission pursuant to its authority.

9           So what the parties, I think, anticipated here is  
10 that, you know, the Commission would be able to look at these  
11 decisions -- and, you know, here we have a decision, for  
12 instance, where the private arbitrator said, well, I know as a  
13 matter of my understanding of the industry practice that  
14 virtual FX arrangements, everyone knew those were in existence  
15 long before the 1996 Act ever started. Now, I can tell you  
16 that that's just flat wrong, as the Commission knows. I mean,  
17 at the time that -- you know, at the time the '96 Act was  
18 passed in Florida, there was nothing like a virtual FX  
19 arrangement because FX -- because central office codes were  
20 associated with a particular central office.

21           COMMISSIONER BRADLEY: Excuse me. Can we --

22           CHAIRMAN BAEZ: Yeah, I'm not sure --

23           COMMISSIONER DEASON: This is not real helpful right  
24 here, what we're discussing.

25           MR. PANNER: Well, I think what it gets to -- I think

1 what it gets to is the significance when we get to the --

2 COMMISSIONER DEASON: I said it's not real helpful,  
3 okay, what you're saying, at least not to me.

4 CHAIRMAN BAEZ: Let's try and stick to a question. I  
5 was going to mention, let's try and stay away from -- this  
6 Commission has authority, and I think that's pretty conclusory  
7 at this point. What my question was, or I think what  
8 Commissioner Bradley's question by extension is, is if -- yes,  
9 did you contemplate some kind of review, without getting into  
10 the question of whether we had authority or not, I mean, I  
11 would ask you this, do you agree that you can't by writing  
12 create authority in this Commission that's not in statutes and  
13 consistent with cases that's not probably specifically in the  
14 statutes? I mean, is that fair?

15 MR. PANNER: That's fair, certainly.

16 CHAIRMAN BAEZ: Would you agree with that?

17 MR. PANNER: I would agree with that.

18 CHAIRMAN BAEZ: Okay. So then, in your opinion, the  
19 nub of this argument is how this Commission is going to  
20 interpret its authority under -- is it 162? Is that --  
21 364.162. Would that be fair to say?

22 MR. PANNER: I think that's right. I think that's  
23 exactly right, Chairman.

24 CHAIRMAN BAEZ: Okay. That's the balance of my  
25 question. Commissioners, if you have any other --

1 COMMISSIONER DAVIDSON: Chairman.

2 CHAIRMAN BAEZ: Commissioner Davidson.

3 COMMISSIONER DAVIDSON: Well, did I cut someone off?

4 COMMISSIONER BRADLEY: No, go ahead.

5 COMMISSIONER DAVIDSON: Okay.

6 CHAIRMAN BAEZ: Well, it's sort of a jump ball here,  
7 and sometimes some Commissioners will and sometimes others, but  
8 you're up. Go ahead.

9 COMMISSIONER DAVIDSON: Well, I'll tell you, I mean,  
10 where I am on this. I have a problem with staff's  
11 recommendation and their analysis. And I think you hit the  
12 nail on the head, and other Commissioners have as well, with  
13 the issue being do we have jurisdiction in the first instance.

14 Staff at Page 16 comments that -- well, at Page 15,  
15 they summarily conclude that we have jurisdiction to consider  
16 the word of the arbitrator in this case, and then at Page 16,  
17 they go on to say that -- they address the issue of should we  
18 exercise, and for them that's more of an open-ended issue. And  
19 I think before we get to the issue of whether the PSC should  
20 take the case we have to address can we, and sort of based on  
21 what's before us here, I believe fairly strongly that we  
22 cannot.

23 The PSC is not an agency of general jurisdiction.  
24 We're a creature of statute, and our powers are limited to  
25 those conferred by statute. And I think again you hit the nail

1 on the head. The parties by agreement cannot confer  
2 jurisdiction where none otherwise exist. Nothing in Chapter  
3 364 relating to this agency specifically or in the Florida  
4 Arbitration Act confers jurisdiction in us to review arbitral  
5 awards, and the PSC has noted in the past that it doesn't have  
6 the jurisdiction to enforce and modify these arbitral awards.

7 Staff, in my view, notably does not point to any  
8 legal authority conferring in this agency the jurisdiction to  
9 review this award and potentially reverse it. They simply  
10 again assume jurisdiction. And while we certainly have subject  
11 matter jurisdiction in general to address interconnection  
12 agreements, my view under both Chapter 364 and the Florida  
13 Arbitration Act is that we don't have authority to do so in  
14 this context where we have a duly issued arbitral award.

15 I think it's really fundamental public policy of this  
16 state as expressed in the Florida Arbitration Act and it's also  
17 federal policy as expressed in the Federal Arbitration Act that  
18 arbitration be promoted as a means of dispute resolution. That  
19 policy, in my view, won't be promoted if, as in this case, an  
20 agency that doesn't have the appellate review authority over an  
21 arbitral award nonetheless chooses to review and possibly  
22 reverse or modify the award. I think if we did that, we would  
23 just outright defeat the purpose of arbitration under Florida  
24 law.

25 Again, Chapter 364 doesn't confer jurisdiction. The

1 Florida Arbitration Act specifically limits the circumstances  
2 under which an award may be challenged and by what entity, and  
3 notably in this state it's by a court. And that doesn't mean  
4 that at some point in the future perhaps a change shouldn't be  
5 considered to Chapter 364 of the Florida Arbitration Act  
6 conferring upon us that jurisdiction, but I just don't think we  
7 have it now. So I, at whatever point a motion is to be made,  
8 would be prepared to move that we deny staff and hold that we  
9 don't have jurisdiction to consider review of this award, but  
10 it also might be worth, you know, considering, you know, should  
11 this issue be briefed for us so that we can have sort of a  
12 greater understanding of the issues.

13 CHAIRMAN BAEZ: Thank you, Commissioner Davidson. If  
14 you can hold that thought for a moment, Commissioner Deason has  
15 some comments, and I think Commissioner Bradley may have  
16 something to say after. Thank you.

17 COMMISSIONER DEASON: Let me say at the beginning  
18 that I'm coming from a different position than what  
19 Commissioner Davidson just expressed. But I do agree with one  
20 of his statements in that we should be in a position where we  
21 as a regulating body should be promoting the use of  
22 arbitration. I'm in agreement with that. I'm not so sure that  
23 Commissioner Davidson's position promotes arbitration.

24 First of all, let me say this. I am uncomfortable  
25 taking a position that states as a matter of fact that the

1 Commission does not have jurisdiction. I think that that is  
2 wrong according to the way the statutes read. I think that the  
3 Commission has plausible jurisdiction in this area. I think  
4 that we would be remiss and at some point probably regret that  
5 we would make a finding at this point that we do not have  
6 jurisdiction. However, the question to me is, how do we  
7 administer that jurisdiction?

8           Back in the -- prior to the reconsideration item when  
9 we had oral argument, Mr. Hoffman referred to an order. It was  
10 the XO order issued December the 21st, 2001. And he presented  
11 it as a basis to support his argument, and I would respectfully  
12 disagree with that. I'm going to read from this order on  
13 Page 5. It says, "We note that during the year since the  
14 informal complaint was made, neither party followed the  
15 provisions for dispute resolution set forth in the agreement."  
16 So this agreement -- I'm not quoting anymore right now. This  
17 agreement had dispute resolution provisions in it. The parties  
18 chose not to follow that and come to the Commission.

19           And now quoting again from the order, "However, now  
20 that a formal complaint has been made to us by XO, and a motion  
21 to dismiss has been filed by Verizon, we find that intervention  
22 by the Commission in this dispute would be contrary to the  
23 terms of the agreement in question, and inconsistent with the  
24 public interest by circumventing the parties' legal right to  
25 contract." So the Commission was finding that they had a legal

1 right to contract for arbitration, they chose not to do it, and  
2 if we did not grant the motion to dismiss, we would be allowing  
3 the parties to circumvent that.

4           And then the order continues, and I think this is the  
5 important part, it says, "We have real and specific concerns  
6 that the FPSC's role and authority under the Act to resolve  
7 disputes be maintained, particularly in the event arbitration  
8 produces a result which we perceive as inconsistent with state  
9 or federal law, or contrary to the public interest." I think  
10 this is real important. What we're saying here is that while  
11 we want to encourage arbitration, we think it can be contracted  
12 for between the parties and that they should use that provision  
13 to arbitrate. If and when there is an arbitration decision  
14 which we as a Commission feel is inconsistent with state or  
15 federal law or contrary to the public interest, we need to have  
16 the ability to step in. But the question is, how do we -- I  
17 think we should be very judicious in the use of that, and there  
18 should be very -- it should be extreme circumstances where we  
19 find that there's been a violation of law or there's something  
20 that just cries out that there's some arbitration decision  
21 which is so contrary to public interest that we have to step  
22 in. And I think by maintaining that authority we actually  
23 encourage parties to go to arbitration because they know that  
24 if there is an extreme circumstance which is so contrary to  
25 public policy or is inconsistent with law, there is a backstop,

1 and we as the Commission would be that backstop.

2 But we should not just go into a situation where  
3 there's been a decision through arbitration and just go in and  
4 try to reimpose our will and say, well, if we had heard it, we  
5 would have chosen differently. I think there needs to be some  
6 type of standard out there before we entertain a review of an  
7 arbitration decision. So that's my position.

8 CHAIRMAN BAEZ: And, you know, that causes my  
9 concerns to -- I'm sorry, Commissioner Bradley, but  
10 Commissioner Deason has struck a nerve here because I'm not  
11 sure, although I don't disagree with the notion of maintaining  
12 some authority in the public interest because it offers -- it  
13 does incent, you know, you can't say, well, we're out of it,  
14 and therefore, companies that are going to go enter into these  
15 interconnection agreements are going to say, you know what,  
16 forget about an alternate dispute resolution because if we're  
17 completely cut out of the Commission, maybe that's not such a  
18 good thing. I don't know if people would agree or disagree  
19 with that lately.

20 But anyway, my problem is this. My problem is that  
21 we can't create -- I'm troubled by any implication that creates  
22 in this Commission some kind of review authority that we  
23 traditionally don't have. And the way that I'm having trouble  
24 unreconciling all of this is the fact that if -- to me, this  
25 language was a "just in case" because it was of a global



1 nature. And what I'm having trouble reconciling is the  
2 arbitration language exists as a proxy for this Commission's  
3 process. Now, it can be completely off the wall, and they can  
4 be completely wrong. I mean, facially they can come to  
5 conclusions that we would never have. But if it was  
6 established as a proxy, then that puts us -- I'm not sure what  
7 posture that puts us on. If it puts us in a review posture,  
8 then I'm having trouble seeing where we have authority to  
9 review any arbitration. And maybe it's something that we  
10 should have, maybe it's something that we need to have in order  
11 that these arbitrations can actually have some meaning. But  
12 I'm having trouble making the leap that we already have it.

13 I think Commissioner Davidson mentioned something  
14 that -- that also struck a cord was that maybe it would be good  
15 to have this debate. I don't think all of the issues -- and we  
16 haven't really seen what the issues are. I'm not so concerned  
17 with the issue of jurisdiction because I think clearly the  
18 subject matter is within our jurisdiction. I'm just not sure  
19 that the jurisdiction and the authority are matched up  
20 completely for my comfort. Maybe that's something that we need  
21 to discuss further or have the parties brief further, and I  
22 wouldn't be in objection to that necessarily. But those are  
23 the issues that I'm having trouble with, is whether we actually  
24 really do have authority to it because it's not explicit in  
25 the -- I mean, if we're going to interpret 162 to be this

1 unlimited authority, you know, I guess we need to talk about  
2 that.

3 COMMISSIONER DEASON: May I make one further comment  
4 really quickly?

5 CHAIRMAN BAEZ: Please.

6 COMMISSIONER DEASON: And then I think Commissioner  
7 Bradley has -- I just want to clarify that I think that the  
8 ability of the parties to contract, I agree with that. I think  
9 we should allow them that, and we should show discretion for  
10 that. But in this situation, they contracted to have the  
11 Commission review it. That was the deal they entered into.

12 Now, if there had not been language in the contract  
13 which said that it could be appealed to the Commission, I would  
14 say, you contracted for it, an arbitrator made the decision,  
15 live with it.

16 CHAIRMAN BAEZ: And I can go as far as to say they  
17 contracted to have a commission review it. I'm not far enough  
18 along to say it was this Commission that -- because again what  
19 really -- what is really causing me trouble is the context in  
20 which this language -- and I think we got agreement from  
21 everyone, the context in which this language arises is a global  
22 agreement in nature, and that, to me, suggests that, yes, they  
23 were trying to anticipate all possibilities, whether there are  
24 commissions with authority clear-cut, whether there are  
25 commissions in which this -- whether there are other laws that

1 confer this kind of review authority, I'm just not sure -- or  
2 at least I'm not there yet. If it's something that we need to  
3 have the parties elaborate on further, if it's something that  
4 would cause -- I know it would give me a little more comfort in  
5 knowing more about it, but anyway, I can defer to the will of  
6 the majority on this.

7 Sorry, Commissioner Bradley, we've had you waiting.

8 COMMISSIONER BRADLEY: And I don't disagree with  
9 anything that has been discussed. This is a matter of  
10 first impression, so we need to make our decision cautiously.  
11 And I want to go back to -- well, go back to my initial  
12 argument and just lay out some things here.

13 COMMISSIONER DAVIDSON: Are you going to lay out  
14 goose eggs or duck eggs?

15 COMMISSIONER BRADLEY: My duck eggs. I think this is  
16 a goose. As Commissioner Deason said, the contract refers to  
17 binding arbitration. The contract also contains an explicit  
18 provision about appeal to a state PSC. The contract also  
19 presumably was negotiated by attorneys who knew what language  
20 they used and what the effect of that language would be. My  
21 question is this. How can we say the parties agreed to binding  
22 arbitration if they also agreed to an appeal of that  
23 arbitration decision? It seems to me -- that's my question.

24 It seems to me that the parties never agreed to  
25 binding arbitration since the language contains an escape

1 clause from the binding part. And I think I heard Commissioner  
2 Davidson mention the filing of briefs. It might be good for us  
3 to move staff which will allow the parties to file briefs as to  
4 why we should choose to either hear this appeal or not hear it.  
5 I don't know how we get out of this quandary that we're in.

6 I mean, the duck description, I mean, if it's binding  
7 arbitration, then it should not have an appeal clause. If it's  
8 just being called binding arbitration and, in fact, it was  
9 something else and has an appeal clause, then that creates  
10 another -- what is it then? What is it, in fact, if it has an  
11 appeal clause? And I don't know how we get out of this.

12 COMMISSIONER DAVIDSON: Chairman, if I may.

13 CHAIRMAN BAEZ: Go ahead, Commissioner Davidson.

14 COMMISSIONER DAVIDSON: And I have a proposal I'd  
15 just like to toss out. Well, I'll toss out the proposal first.  
16 The proposal would be that we --

17 CHAIRMAN BAEZ: Hold on. If you're using proposal as  
18 a motion --

19 COMMISSIONER DAVIDSON: No, I was. Well, then I'll  
20 address -- I was going to respond to Commissioner Bradley's  
21 question.

22 CHAIRMAN BAEZ: Oh, okay. I'm sorry, Commissioner.  
23 Go ahead.

24 COMMISSIONER DAVIDSON: I was just reversing the  
25 order, but I'll respond to his question first. And I know

1 Commissioner Jaber also has arbitral experience, and she may  
2 want to jump in. But, Commissioner Bradley, you can have sort  
3 of a final and binding arbitral award that's subject to review  
4 and appeal. Maybe it doesn't make sense, but under the Florida  
5 Arbitration Act, the Federal Arbitration Act and oftentimes  
6 just in the parties' agreements, an arbitral award is rendered,  
7 and it's considered final and binding but that can still --  
8 notwithstanding a characterization of final and binding can  
9 still be subject to some type of appeal either by default under  
10 the Florida Act or Federal Act or if the parties agree to a  
11 specific appeal process, so the award was still binding.

12 I would note though the parties can't by agreement,  
13 for example, confer jurisdiction in the D.C. Circuit Court of  
14 Appeal to consider an appeal. They would have to go to the  
15 district court. So you can't just -- the parties can't just  
16 sort of create a right of appeal or review wherever they want  
17 to. They would -- sort of state and federal law would govern  
18 that. So I wanted to address that.

19 And the proposal -- and it's not in the form of a  
20 motion yet. I just wanted to sort of throw it out for  
21 consideration -- would be that we defer this item to a date to  
22 be set by the Chairman, at which date would be after receipt of  
23 briefs from the parties on this threshold jurisdiction to  
24 review the award issue.

25 CHAIRMAN BAEZ: Well, Commissioner Davidson, I'm

1 almost afraid to say "deferral" out loud, so I'm glad you said  
2 it first. This issue has been floating around for quite some  
3 time or deferred at least a few times that I can recall.

4 And although I think we might be able to get to that  
5 same function, there are some issues -- for instance, you know,  
6 Issue 2, we can dispose of if no one -- I haven't heard much  
7 talk about that, the procedural -- we're on comments already.  
8 I think -- thank you, Mr. Hoffman.

9 Commissioners, you know, like Issue 2, I think we can  
10 probably -- we're more concentrating on Issue 3 now with all  
11 the problems.

12 COMMISSIONER JABER: Mr. Chairman, as a transition  
13 for me to ask some questions, I'll be glad to give you a motion  
14 on Issue 2, if you'd like, but I do have some questions.

15 CHAIRMAN BAEZ: If they're not on Issue 2, then I  
16 don't see why we can't move along and get that one at least out  
17 of the way.

18 COMMISSIONER JABER: I would move staff on Issue 2.

19 CHAIRMAN BAEZ: And there's a motion. Is there a  
20 second?

21 COMMISSIONER DEASON: Second.

22 COMMISSIONER DAVIDSON: Second.

23 CHAIRMAN BAEZ: A motion and a second. All those in  
24 favor say "aye."

25 (Simultaneous affirmative vote.)

1           CHAIRMAN BAEZ: Thank you, Commissioners. So Issue 2  
2 has been dealt with.

3           Obviously our discussion has been mostly on Issue 3.  
4 And, Commissioner Jaber, you said you had some questions.

5           COMMISSIONER JABER: They're really to staff. And  
6 before we broke Commissioner Davidson followed up on a question  
7 I wanted to address to staff, and I appreciated his doing that  
8 because it gave me some clarification.

9           I may have completely misread staff's recommendation  
10 and misunderstood the intent. When I went to Page 16 and other  
11 parts of the recommendation, I understood that you wanted to  
12 know what the factual, legal, and policy questions were to be  
13 able to come back to the Commission in some fashion to address  
14 jurisdiction for us. And then in response to Commissioner  
15 Davidson's question, you all articulated that you've already  
16 taken the position that the Commission has jurisdiction. I  
17 need you to clarify that for me first. And second, I need --  
18 maybe, Mr. Melson, you could do this while Ms. Banks answers  
19 the other question. There's a provision in 120.80 -- let's  
20 see, it's 120.80(13)(e) that talks about the PSC's appellate  
21 jurisdiction in light of implementing the Act.

22           Rick, I don't know what that provision means. Maybe  
23 you can read it and give me your opinion on it.

24           MS. BANKS: Commissioner Jaber, if I understand what  
25 your question is, is whether or not staff has taken a position

1 that the Commission has jurisdiction in this matter. I believe  
2 that we have on a preliminary basis and the fact of the context  
3 of what the agreement provides and what Section 364.162  
4 delineates about the Commission having authority to consider  
5 interconnection agreements or disputes in interconnection  
6 agreements. One thing I will say that staff --

7 COMMISSIONER JABER: Let me stop you there. So your  
8 statement in the rec about jurisdiction -- yeah, you really  
9 need to be careful here because there's jurisdiction in  
10 interconnection agreements, and then there's the jurisdiction  
11 that we've discussed today over an arbitration that has come  
12 under the PSC's umbrella pursuant to an appellate action taken  
13 by Verizon. Does that make sense? I see a distinction. Is  
14 there a distinction to be seen?

15 MS. BANKS: I believe that there is a distinction  
16 that says that staff was focussing more on what the  
17 Commission's general authority was regarding interconnection  
18 agreements.

19 COMMISSIONER JABER: All right. So then I did  
20 understand your recommendation correctly. You want to be able  
21 to identify all the issues and come back and tell us whether  
22 you believe we have jurisdiction over the arbitrated issue.

23 Commissioners, am I --

24 COMMISSIONER DEASON: I didn't read the  
25 recommendation that way. The way I read it was that we have



1 jurisdiction. It's a question of whether we choose --  
2 according to the terms of the contract whether we choose to  
3 exercise that, whether it rises to the level that we should --

4 CHAIRMAN BAEZ: Exercise our discretion.

5 COMMISSIONER DEASON: -- exercise that discretion.

6 COMMISSIONER JABER: Thank you, Commissioners.

7 COMMISSIONER DEASON: That's the way I read the  
8 recommendation.

9 COMMISSIONER JABER: Is that a fair articulation?

10 MS. BANKS: Yes, Commissioner Jaber, yes. I may have  
11 misunderstood your question, but, yes, that's a fair  
12 articulation what the Commissioner cited.

13 COMMISSIONER JABER: Okay. And, Mr. Melson, that  
14 provision in 120.

15 MR. MELSON: I think that provision in 120 simply  
16 says when we make a decision about an interconnection  
17 agreement, if under federal law, review of that would be in  
18 U.S. District Court, that it can go there rather than  
19 necessarily going only to the Florida Supreme Court. So this  
20 is court review of Commission decisions, not the Commission  
21 sitting in any sort of appellate capacity.

22 COMMISSIONER JABER: Okay. Appellate jurisdiction  
23 for Public Service Commission decisions. It's not that we have  
24 appellate jurisdiction, it's talking about where our decisions  
25 go.

1 MR. MELSON: Correct.

2 COMMISSIONER JABER: Okay.

3 CHAIRMAN BAEZ: Well, Commissioners, there have been  
4 a couple of proposals out there. I don't know.

5 Go ahead, Commissioner Bradley.

6 COMMISSIONER BRADLEY: You know, getting back to the  
7 language now. Are we reviewing a decision or taking an appeal?

8 MR. MELSON: Commissioner, that's one of the things  
9 the staff recommendation, in essence, asked the parties to  
10 brief. My recollection of the initial petition to us was that  
11 one party was suggesting that if we reviewed it, it would be de  
12 novo.

13 COMMISSIONER BRADLEY: It would be what?

14 MR. MELSON: De novo. We would start over and  
15 basically duplicate all of the effort. The other party -- if  
16 we took jurisdiction, it should be an appellate type review  
17 simply on the record. I don't believe the parties even agreed  
18 on that, although today it seemed to me that Verizon's position  
19 might have shifted somewhat. It is called an appeal under the  
20 interconnection agreement. I believe the reason staff  
21 recommended -- that we thought you had jurisdiction is we  
22 thought it was covered under 364.162, that this was authority  
23 to arbitrate a dispute regarding the interpretation of  
24 interconnection. I understand you do not have appellate  
25 authority, and that's another way to look at the issue.

1           And if you decide that this really is appellate  
2 authority -- and I think Commissioner Davidson's point, that  
3 nowhere does the statute grant you appellate authority, is a  
4 good one. It's a question of which way you look at the issue.

5           I was told about 15 years ago when I practiced over  
6 here by a former general counsel, if in doubt, assert  
7 jurisdiction and let the court tell you you don't have it.

8           COMMISSIONER DAVIDSON: That's a --

9           MR. MELSON: And now that I'm sitting on this side of  
10 the table, that's the philosophy I tend to come with, although  
11 I recognize, you know, you all have got to make those tough  
12 judgments.

13           COMMISSIONER JABER: I don't remember that general  
14 counsel, Mr. Melson.

15           COMMISSIONER DAVIDSON: Yeah, I don't think you hired  
16 him, Commissioner.

17           COMMISSIONER JABER: No, I don't think so.

18           CHAIRMAN BAEZ: Mr. Melson, a question. And I really  
19 am still trying to resolve what our jurisdiction looks like as  
20 it regards arbitration agreements. Now, I want to -- something  
21 I didn't say before. I agree with Commissioner Deason  
22 wholeheartedly. I think we need to be -- continue to do things  
23 consistent with encouraging this kind of language being  
24 included.

25           If it's a question of trying to iron out more clarity

1 into it or write more clarity into it so that it can be better  
2 defined what a future world looks like with arbitration in it,  
3 then so be it. It's good that we're having this discussion.  
4 But in terms of distinctions, do you see any distinction if  
5 this were a case in which there was an existing arbitration  
6 award that wasn't being -- that wasn't -- could we enforce an  
7 arbitration award, for instance, or do you not see any  
8 distinction?

9 MR. MELSON: I think if the parties had not included  
10 this language in 11.2 that says the arbitration award is not  
11 final if, if that language wasn't there, the arbitrator's award  
12 would have been the end of the line except for whatever limited  
13 review there might be under Chapter 682 and we would not be  
14 involved. It's the fact that the parties in defining the  
15 process they were going to use defined an arbitration process  
16 that has a step in it that is reviewed by the Commission. If  
17 the parties had defined no arbitration process at all, we would  
18 be the place that dispute came. They took it away from us in  
19 the first instance by saying it goes to arbitration, but then  
20 they gave it back to the extent that we have jurisdiction and  
21 decide to hear it. To me, the focus -- the primary focus could  
22 very well be should we decide to hear it, but you don't get  
23 there without either deciding the jurisdictional issue or  
24 saying we won't hear it anyway so we don't have to reach the  
25 jurisdictional issue.

1           CHAIRMAN BAEZ: Can you point me to the language?  
2 And I guess as part of this, I don't have the agreement before  
3 me, but we've been throwing out a bunch of section numbers and  
4 I'm only seeing Section 11.3 that's actually in the text unless  
5 I'm missing --

6           MR. MELSON: If you look on Page 8 of the  
7 recommendation, there is an excerpt from Paragraph 2.

8           CHAIRMAN BAEZ: Okay. Here you go. All right.  
9 Jurisdiction of the Commission or FCC. All right.  
10 Commissioner Deason had a question.

11           COMMISSIONER DEASON: I wanted to explore something  
12 with Mr. Melson which he just said, and I really hadn't thought  
13 of it before. You indicated that if there had not been the  
14 provision in this agreement calling for arbitration, that if  
15 there had been a dispute, it would come to us.

16           MR. MELSON: That's correct.

17           COMMISSIONER DEASON: So it seems to me that that  
18 answers the question. We have jurisdiction to settle disputes.  
19 They decided to write us out of that step, and I think they  
20 should have the authority to do that. But then they're not  
21 granting us jurisdiction by their agreement, they're just  
22 putting it back in, which was the status quo to start with.  
23 They put the step of arbitration in there, but then they put us  
24 back in. If there is a further dispute after arbitration, it  
25 comes here. In my assessment, is that -- I'm not trying to put

1 words in your mouth, but I hear that's what you're saying.

2 MR. MELSON: Yes, sir. That was the way staff read  
3 it. The argument today has focused though on that review by us  
4 being in the nature of an appellate review of an arbitration  
5 decision. And if you look at it from that perspective, you  
6 could reach a different decision.

7 COMMISSIONER DEASON: Okay.

8 COMMISSIONER JABER: Mr. Chairman, that keeps  
9 bringing me back to the question I asked, what exactly do we  
10 have jurisdiction over, as we sit here today, and I have to  
11 tell you, one of the things I've never been shy about, as you  
12 all know, is when I'm confused I just tell you I'm confused.  
13 By the end of this conversation, I am utterly confused. And I  
14 know you don't want me to use the "D" word. You already said  
15 that to Commissioner Davidson, but --

16 COMMISSIONER DAVIDSON: I say use it.

17 COMMISSIONER JABER: I'd rather air on the side of  
18 the "D" word, but I don't want the time to go in vain, so if I  
19 could talk out loud about my original thought. I really  
20 thought that we could be benefited by allowing the parties to  
21 outline what they perceive were the issues and to identify  
22 which they thought were policy, legal, and factual, and let  
23 staff digest that and bring it back to us. Maybe that's what I  
24 wanted to read in the recommendation, I don't know. But I also  
25 like Commissioner Davidson's idea to allow for additional

1 briefing on the legal issue. I don't offer that as a motion or  
2 anything like that, Chairman. I'm just thinking out loud.

3 I also fully appreciate and agree with Commissioner  
4 Deason. And, frankly, if he was going to turn that into a  
5 motion, that would have been the motion I would have supported,  
6 which is to preserve the opportunity for the Commission to make  
7 a statement with regard to what is consistent with federal and  
8 state law. The ability to protect that is something I'm  
9 sympathetic to.

10 Here's what gives me concern though about doing that  
11 blanket. I don't want to set up an environment where parties  
12 don't like the arbitrated decision, what the arbitrator does,  
13 and they forum shop. I don't want to encourage it; I don't  
14 want to allow it. I'm not saying that's what happened here. I  
15 really don't know. That was the whole intent of appreciating  
16 what staff was -- what I thought staff was trying to do was I  
17 don't know if anyone is forum shopping here. I don't think  
18 regulatory, business, or otherwise we should facilitate an  
19 environment that allows parties to come to the PSC not as a  
20 backstop but as a, well, we don't like the decision in  
21 arbitration, and we're going to come to the PSC for a better  
22 decision. I'm talking out loud, Mr. Chairman. Like you, I'll  
23 defer to the will of the majority, but --

24 COMMISSIONER BRADLEY: Well --

25 CHAIRMAN BAEZ: Go ahead, Commissioner Bradley.

1 Please.

2 COMMISSIONER BRADLEY: Commissioner Jaber, I don't  
3 disagree with your description of a binding arbitration. I  
4 guess the area that's problematic for me is the fact that there  
5 is a clause that allows for what you just called forum shopping  
6 or an opt out, and we just can't get around it because that's  
7 part of the agreement. So how do we resolve that language to  
8 the extent that we have an unappealable decision?

9 I mean, the language clearly states that if the  
10 process breaks down, that the option is to bring it back to us.  
11 For us to ignore that language I think creates a legal dilemma,  
12 and I --

13 COMMISSIONER DAVIDSON: Well, Commissioner, if I can  
14 jump in here. I mean, I'm not sharing that same concern  
15 because it's -- I'm sitting here thinking about it, and there  
16 are some easy fixes that could be taken care of in the drafting  
17 of this. Parties could -- you can be very precise and clear in  
18 your drafting. The one thing you can't do is create  
19 jurisdiction where it doesn't exist, but I think this  
20 agreement, a template, so to speak, was not that clear. I  
21 think a lot of this is in the parties' control. I think -- I  
22 share Commissioner Jaber's concern about the forum shopping  
23 because the shoe can always be on the other foot. It's always  
24 sort of the -- somebody who's the loser in the arbitration that  
25 wants to go then seek to revisit the award, but that defeats



1 the whole purpose of arbitration.

2 I mean, my view, just as I'm sitting here, I am -- my  
3 own view is, is that the Commission does not have jurisdiction  
4 to sort of reopen this award and consider either a de novo  
5 review or an evidentiary hearing, but I'm -- and so I would be  
6 prepared to make that motion, but I'm also prepared to just  
7 say, hey, all right, you know, educate me, show me how and why  
8 the Commission has jurisdiction in this context.

9 COMMISSIONER DEASON: And if I --

10 CHAIRMAN BAEZ: Go ahead, Commissioner.

11 COMMISSIONER DEASON: I'm not so sure we're going to  
12 get any more education than we've gotten here today. I mean,  
13 we've had full argument, much more than 20 minutes per side on  
14 the legal issue of jurisdiction, and, you know, either you  
15 believe we do or we don't. I mean, I'm not against it, I  
16 guess, if the parties want to brief it, but, you know, I'm not  
17 so sure there's anything more that can be said that hasn't been  
18 said already here today.

19 COMMISSIONER DAVIDSON: Well, then I guess --  
20 Chairman, what are your thoughts on this?

21 CHAIRMAN BAEZ: Hold on because I have a question of  
22 Commissioner Deason.

23 Commissioner, you and I have the same read on what  
24 the recommendation was, but the recommendation left one answer  
25 left as to whether acknowledging that the Commission had some

1 form of discretion whether to entertain this particular  
2 question or not. I mean, do you agree that that's still the  
3 case?

4 COMMISSIONER DEASON: Oh, absolutely. I think that  
5 the Commission has the discretion as to whether we want to  
6 exercise the jurisdiction. And I personally would put that at  
7 a very high threshold that it has to be something that just  
8 calls out for the Commission to step in, either something that  
9 we think violates state or federal law or we think that there  
10 is something out there that is so adverse to public policy that  
11 it necessitates us reviewing an arbitration decision.

12 CHAIRMAN BAEZ: Do you feel that that -- I mean, I  
13 guess I'm just trying to understand more about it. If you  
14 agree that that is part of the question of discretion, do you  
15 believe that even that education has been before us today, or  
16 no?

17 COMMISSIONER DEASON: No, I'm just talking about just  
18 on the question of jurisdiction. That's one question. Then  
19 the question is, if you decide you have jurisdiction, how do  
20 you exercise that jurisdiction? What should be the threshold  
21 before you decide that you are going to insert yourself into  
22 this process?

23 CHAIRMAN BAEZ: Commissioner Bradley.

24 COMMISSIONER BRADLEY: I'm just beginning to wonder  
25 if no matter which decision we make, it's going to end up --

1 CHAIRMAN BAEZ: As part of someone else's discretion.

2 COMMISSIONER BRADLEY: Someone is going to appeal it  
3 to a higher court.

4 CHAIRMAN BAEZ: What's the process on that? Sorry to  
5 keep beating -- I mean, there is a --

6 COMMISSIONER DEASON: We should be mindful, this has  
7 been going on since 2001.

8 CHAIRMAN BAEZ: Beyond reconsideration, what's the  
9 process on that?

10 MR. MELSON: The process would be an appeal probably  
11 to federal court, although I'd have to think about that. That  
12 happens if you decide the jurisdictional issue up or down. If  
13 you were to reach the second question, should you hear it and  
14 decide as a matter of discretion that it doesn't rise to the  
15 level of something you want to hear, that would be a much more  
16 difficult decision to appeal simply because --

17 COMMISSIONER BRADLEY: Say that again now. Make your  
18 last statement.

19 MR. MELSON: The agreement gives you discretion to  
20 hear the matter or not even if you have jurisdiction. You  
21 could assume for the sake of moving forward, assume you have  
22 jurisdiction but say we would not hear it in any event. At  
23 that point, you've got an order that it doesn't strike me as  
24 very appealable by either side because I don't think a court is  
25 going to review your discretion to agreeing not to hear a

1 matter that you didn't have any obligation to hear.

2 COMMISSIONER JABER: I hope that helped.

3 COMMISSIONER DAVIDSON: Chairman, to get this moving  
4 along --

5 CHAIRMAN BAEZ: Yes, please.

6 COMMISSIONER DAVIDSON: -- I am going to move that  
7 the Commission deny staff's recommendation and hold that the  
8 Commission does not have the jurisdiction to review, reopen,  
9 reconsider the arbitral award at issue for all the reasons I've  
10 given before.

11 CHAIRMAN BAEZ: There's a motion to deny staff. And  
12 just to clarify, that's on Issue 3, Commissioner?

13 COMMISSIONER DAVIDSON: Yes.

14 CHAIRMAN BAEZ: Okay. Motion to deny staff on Issue  
15 3 and thereby making the determination that the Commission  
16 lacks jurisdiction outright to review the arbitration award.  
17 Is there a second?

18 I'm going to pass the gavel and second the motion in  
19 part, Commissioners, for this reason. I am not convinced that  
20 we can imply some kind of review authority under our empowering  
21 statutes. I think that's a big stretch in terms of process,  
22 although for all the policy reasons, it probably would make  
23 sense, I'm just -- I don't have that kind of comfort to be  
24 stretching like that. So I'll second the motion.

25 COMMISSIONER DEASON: Okay. There is a motion and a

1 second. All in favor of the motion say "aye."

2 CHAIRMAN BAEZ: Aye.

3 COMMISSIONER DAVIDSON: Aye.

4 COMMISSIONER DEASON: All opposed, "nay."

5 COMMISSIONER JABER: Nay.

6 COMMISSIONER DEASON: Nay.

7 COMMISSIONER BRADLEY: Nay.

8 COMMISSIONER DEASON: The motion fails.

9 CHAIRMAN BAEZ: Thank you, Commissioner Deason. The  
10 motion fails.

11 Commissioners, I think we might be able to come up  
12 with something that comforts everybody at least for the time  
13 being, but I leave it to you all to parse out.

14 COMMISSIONER DAVIDSON: Well, Chairman, I have a --

15 COMMISSIONER BRADLEY: Let me say this.

16 CHAIRMAN BAEZ: Hold on, Commissioner Davidson.

17 COMMISSIONER BRADLEY: Principally, I don't disagree  
18 with the concept of arbitration. The quandary that I have is  
19 the fact that there's additional language that remands it back  
20 to the state PSC if it falls apart, and that language never  
21 should have been in the contractual agreement. I don't  
22 disagree with the concept of arbitration as described by you  
23 and described by Commissioner Deason -- I mean, Davidson, I'm  
24 sorry.

25 CHAIRMAN BAEZ: You're probably right. My --

1           COMMISSIONER BRADLEY: And I don't know how we get  
2 out of this.

3           CHAIRMAN BAEZ: My conflict, just so you can  
4 understand as it clarifies more, my conflict is this. I don't  
5 think that that language reinvesting a commission, the  
6 commission unnamed with jurisdiction yet again, in essence,  
7 negating the effect of an arbitration provision was done with  
8 any specific knowledge of what status we have as an authority.  
9 I don't think -- I mean, I think both parties here today have  
10 said that it is true that it is part of a global context in  
11 which the language appears, and based on that, I can't say one  
12 way or another whether there's any specific knowledge on the  
13 part of the -- even the contracting parties that are creating  
14 this language to say, you know what, this is true in every --  
15 in all 50 instances or 51 or however many commissions we're  
16 dealing with, you know, there is no specific knowledge in this.  
17 That itself doesn't answer the question as to whether we have  
18 the authority in us that this language purports to reconfer.  
19 And I'm not sure -- I guess I'm not as far as saying it  
20 reconfers, although it makes a lot of sense, but I'm not sure  
21 that's what's going on here --

22           COMMISSIONER BRADLEY: , Well --

23           CHAIRMAN BAEZ: -- because at the end of the day,  
24 arbitration is there as a proxy for that primary effort. If we  
25 were standing in the shoes of the arbitrator, we would have our

1 decisions appealed elsewhere. We wouldn't have our decisions  
2 appealed to ourselves because we don't -- I mean, there is  
3 someone else that has appellate review, not us.

4 COMMISSIONER BRADLEY: Right. And as I said, I  
5 believe in binding arbitration, but there's some problematic  
6 language that was put in there by some very competent and very  
7 understanding attorneys, which goes back to my duck argument.  
8 I mean, was this binding arbitration, or was it something else  
9 that they were creating and calling it binding arbitration?  
10 You know, these are highly competent, very skillful attorneys,  
11 and I'm just wondering if there's a mistake that was made with  
12 respect to what this was labeled as being.

13 Now, the other discomfort I have is, even though I  
14 believe in binding arbitration, I still believe that this  
15 language was put in because there was probably some feeling  
16 that maybe the arbitrator might not have the expertise to fully  
17 understand this highly technical issue and that was some "just  
18 in case" language. And I know I haven't helped the cause.

19 COMMISSIONER DAVIDSON: Well, how about this?  
20 Chairman, to keep this moving along, I've got another motion,  
21 and that motion is that we defer vote on this item to a date to  
22 be determined by the Chairman and that in the meantime the  
23 parties brief the Commission with short, concise, say, ten-page  
24 briefs on the jurisdictional issue addressing whether the  
25 Commission has the jurisdiction to determine this issue, and

1 then, part two, addressing the issues and concerns raised by  
2 Commissioner Jaber, sort of laying out all of the issues,  
3 policy, fact, law, et cetera, to be addressed.

4           CHAIRMAN BAEZ: Commissioner Davidson, I'm trying to  
5 match up what your motion is to what the staff  
6 recommendation -- or at least part of the staff recommendation  
7 is. Are you, in essence, trying to restate on Page 7 in the  
8 middle of the page the A, B, C, and D? I mean, is that the  
9 kind of thing that you would like to see in a brief, although  
10 obviously through some other vehicle?

11           COMMISSIONER DAVIDSON: Yes. I think those are the  
12 issues. I think they're sort of reiterated at Page 16, but I  
13 would also like to see a brief that addresses sort of the  
14 threshold jurisdictional instance that we can get there in the  
15 first place. And let me state, I agree with Commissioner  
16 Deason that there's a public interest here to be served, but I  
17 also agree that we have to sort of follow the letter of the  
18 law. So at some point perhaps a change to the law is needed if  
19 the PSC is indeed the right body to be reviewing arbitral  
20 decisions. But sort of that said, I'm not convinced we have  
21 jurisdiction. I threw the motion out there, it failed. This  
22 is an alternate that I think can help get all of us better  
23 educated, maybe Commissioner Deason doesn't need it. I would  
24 like to see it, and I think we can address some of the issues  
25 that Commissioner Jaber has raised, so that's --



1           COMMISSIONER DEASON: I probably need a lot of legal  
2 education, it's a question of whether I want it or not.

3           CHAIRMAN BAEZ: That is a matter for your discretion,  
4 sir.

5           COMMISSIONER JABER: Mr. Chairman, I really believe I  
6 can second the motion, but before I do that, I wonder,  
7 Commissioner Davidson, if you would entertain an interjection.

8           COMMISSIONER DAVIDSON: A friendly amendment.

9           COMMISSIONER JABER: I'm sorry?

10          CHAIRMAN BAEZ: A friendly amendment.

11          COMMISSIONER JABER: A friendly amendment, yeah,  
12 which would be to establish a time certain for briefs and when  
13 those could come back. Commissioner Deason also makes a very  
14 good point that this has been deferred several times and the  
15 parties' process at least has been going on since 2001. So I  
16 wonder if we could either direct staff to bring it back as soon  
17 as feasible, but my preference is that we actually give them a  
18 date, the parties a date to file this information and then  
19 staff a date to bring a recommendation back.

20          COMMISSIONER DAVIDSON: I agree with the goal. I was  
21 just going to leave it to the Chairman's Office to set those  
22 dates for the receipt of briefs and for the next agenda based  
23 on whatever the schedule is, but I have no problem with that  
24 suggestion.

25          CHAIRMAN BAEZ: Well, this is --

1 COMMISSIONER JABER: Guess who's the Prehearing  
2 Officer?

3 CHAIRMAN BAEZ: You.

4 COMMISSIONER DAVIDSON: You.

5 COMMISSIONER JABER: No.

6 CHAIRMAN BAEZ: Who?

7 COMMISSIONER JABER: Commissioner Davidson.

8 CHAIRMAN BAEZ: Commissioner Davidson. And the Chair  
9 will exercise its prerogative. I love that.

10 COMMISSIONER JABER: I'm sorry, Commissioner  
11 Davidson. I really had not looked at that page before I opened  
12 my mouth.

13 CHAIRMAN BAEZ: Never punt to the Chair,  
14 Commissioner.

15 COMMISSIONER DAVIDSON: You know, obviously I have  
16 not either.

17 CHAIRMAN BAEZ: Real briefly, all kidding aside, I  
18 mean, you know, it sounds like there's a second because a  
19 friendly amendment was -- and just for your information,  
20 Commissioners, I think I can probably support it too to bring  
21 this all home. But a very quick discussion, I guess, having  
22 read the writing on the wall, ladies and gentlemen, an adequate  
23 time to get all this information to us, please.

24 MR. PANNER: Chairman, the staff recommends 20 days  
25 in the staff rec and that would be fine with Verizon.

1 CHAIRMAN BAEZ: Mr. Hoffman, any objection to the 20  
2 days? We want to try and get everybody together on this.

3 MR. HOFFMAN: Mr. Chairman, no, we don't object to  
4 the 20 days, but we would like to follow the procedure that the  
5 staff outlined where we would respond to Verizon's papers.

6 CHAIRMAN BAEZ: I think, Mr. Hoffman -- and I don't  
7 know, I'm having trouble seeing what the issues are beyond what  
8 the motion contained in terms of -- I mean, you're doing this  
9 for our benefit so that we can get educated, and it would seem  
10 to me that your best shot is in order no matter what Mr. Panner  
11 and his client say.

12 COMMISSIONER JABER: Mr. Chairman, I think --

13 CHAIRMAN BAEZ: And the reason I say that,  
14 Mr. Hoffman, is, you know, 20 days -- I think everybody  
15 appreciates how long this has been percolating, and now,  
16 although we have taken some affirmative steps, let's start  
17 fixing what the issues are so that we can really see them and  
18 sink our teeth into them. We don't want it laying out any  
19 better. So I think --

20 COMMISSIONER JABER: I think I understand  
21 Mr. Hoffman's point. Verizon initiated the process here. And  
22 what staff originally recommended, and, Commissioner Davidson,  
23 I hope you would agree to this as well, what Mr. Hoffman is  
24 bringing to our attention is if Verizon could submit the list  
25 of their proposed issues, then TCG could respond more

1 adequately by telling us their opinion on jurisdiction.

2 COMMISSIONER DAVIDSON: And that's fine. You know  
3 what? It really doesn't matter to me at this point. I agree  
4 with Chairman Baez. I mean, I agree with both of you, but on  
5 this, I think you know what, to Mr. Hoffman, your best shot,  
6 just throw in your strongest argument. You made your argument.  
7 You see where the different Commissioners are. This is not  
8 sort of a mini, expedited whole case up front, it's address the  
9 jurisdictional issue and then lay out some of these other  
10 issues. This is not sort of the whole issue ID and statements  
11 and positions up front. It's really a -- I think to get to,  
12 one, the initial jurisdictional issue and, two, give a little  
13 bit of guidance as to whether or not this reaches sort of that  
14 level that Commissioner Deason was talking about, do we want to  
15 do something about -- once we -- if the Commission concludes it  
16 has jurisdiction over this issue, then the parties will be at  
17 liberty to fully brief the case and raise all the issues and  
18 show everybody why it is or is not at the level that  
19 Commissioner Deason has articulated. So I would -- my thought  
20 was both sides just within -- I was going to say ten days, but  
21 let's say 20 days, just throw in their strongest brief on why  
22 the Commission does have jurisdiction to even consider these  
23 issues and why it does not. That was the intent of my motion.

24 CHAIRMAN BAEZ: Do you still second, Commissioner  
25 Jaber?

1           COMMISSIONER JABER: Maybe we could get the parties  
2 to help us here. What I heard Mr. Hoffman say is we don't know  
3 what the issues are until Verizon -- but don't let me put  
4 words --

5           CHAIRMAN BAEZ: I appreciate what your position is,  
6 and perhaps it's something that we all need to work on in order  
7 to serve some greater interest here trying to get you guys some  
8 certainty, and really, there seems to be a very important issue  
9 as to what this Commission is going to define its role as going  
10 forward on these types of situations.

11           COMMISSIONER DAVIDSON: So let's maybe come up with  
12 ten business days for Verizon to get in its first -- its  
13 jurisdictional brief and additional five business days, a full  
14 workweek for TCG to respond.

15           CHAIRMAN BAEZ: That's not 20 anymore, or am I  
16 counting wrong?

17           COMMISSIONER DAVIDSON: Or let's divide up the 20 so  
18 that we have an initial set of papers, you have jurisdiction,  
19 and then a responsive set of papers, whatever makes sense in  
20 terms of the calendar.

21           CHAIRMAN BAEZ: Verizon, what are you willing to --

22           MR. PANNER: Whatever would be helpful to the  
23 Commission.

24           CHAIRMAN BAEZ: Ten and ten, is that all right?

25           MR. PANNER: That's fine.

1 CHAIRMAN BAEZ: Ten and ten, ladies and gentlemen.

2 MR. PANNER: Ten business days so two weeks.

3 CHAIRMAN BAEZ: Ten business days.

4 MR. PANNER: Thank you.

5 CHAIRMAN BAEZ: See how easy I am. Ten business to  
6 respond.

7 MR. HOFFMAN: That's fine, Chairman.

8 CHAIRMAN BAEZ: Okay. So that way we can have that  
9 staggered and you get your issues. All right. So the motion  
10 is, if I haven't forgotten it already, is to defer to a time  
11 certain, and that would be the next agenda following this  
12 timetable. Verizon will have ten business days to come up with  
13 its initial list of issues and the brief of the information as  
14 outlined in the motion.

15 Mr. Hoffman, your client is going to have ten days  
16 after to respond.

17 MR. HOFFMAN: Is there still a ten-page limit,  
18 Chairman?

19 CHAIRMAN BAEZ: You know, I don't see why ten  
20 pages -- I'm serious, take your best shot. I'm not going to  
21 grade it by doing this. All right. Just really, let's get to  
22 the nub of the issues here.

23 MR. HOFFMAN: Okay.

24 CHAIRMAN BAEZ: All right. Thank you. And, you  
25 know, we'll take care of reading the cases that we need to

1 read, so use your words sparingly.

2 To continue the motion, the filing shall have  
3 identifying factual, legal, and policy issues for which review  
4 may be sought and that addresses the reasons the Commission  
5 should agree to review the arbitration decision and specifies  
6 the type of proceeding, whether de novo or appellate, and,  
7 lastly, identifies applicable standards; ten and ten. Am I  
8 missing anything?

9 COMMISSIONER DAVIDSON: Nope, that's it.

10 CHAIRMAN BAEZ: I can't fix the date now, but,  
11 Ms. Banks, you can come and work with me to fix an agenda date  
12 that will accommodate the timetables that they have already  
13 established.

14 MS. BANKS: Yes, Mr. Chairman. I did have one  
15 question of clarification. Is it contemplated that staff would  
16 issue an order on substantive Issue 2 prior to --

17 COMMISSIONER JABER: That's a good question.

18 MS. BANKS: -- the filings of the parties?

19 CHAIRMAN BAEZ: I'm sorry. Can you say that again?

20 MS. BANKS: Issue 2, which deals with whether or not  
21 the appeal was timely, I believe you all voted on that issue.

22 COMMISSIONER JABER: Mr. Chairman, may I suggest --  
23 the question, while it's good, is premature. We need to vote  
24 on the motion that's on the table before we come back to --

25 CHAIRMAN BAEZ: Yeah --

1 COMMISSIONER JABER: It presumes that this motion  
2 carries.

3 CHAIRMAN BAEZ: -- let's handle that as it comes up.  
4 But there is a motion. Is there a second?

5 COMMISSIONER JABER: Second.

6 COMMISSIONER DEASON: Before we vote, I have a  
7 question.

8 CHAIRMAN BAEZ: Yes, by all means.

9 COMMISSIONER DEASON: I just want to confirm that the  
10 procedure that has been incorporated in the motion and that we  
11 intend to follow that when this is brought back to the agenda  
12 for the next time, we will be in a position to vote both on the  
13 jurisdiction, if we find we do have jurisdiction, and on the  
14 question as to whether we're to assert it based upon the facts  
15 of this case.

16 CHAIRMAN BAEZ: That would be my hope.

17 COMMISSIONER DEASON: Okay. I just want to get this  
18 thing completed as quickly as possible.

19 CHAIRMAN BAEZ: And I would agree with you. I'm with  
20 you on that, Commissioner Deason.

21 There was a motion, a second, and a question. All  
22 those in favor say "aye."

23 (Simultaneous affirmative vote.)

24 CHAIRMAN BAEZ: Thank you. And now, you had a  
25 question, Ms. Banks. Do you have to issue an order



1 specifically on Issue 2?

2 COMMISSIONER DAVIDSON: Couldn't staff just hold  
3 off --

4 MS. BANKS: I believe that was answered, I thought.

5 COMMISSIONER JABER: No. I was just suggesting your  
6 question was premature.

7 CHAIRMAN BAEZ: We were holding off on it. Now you  
8 really do have a question since we're deferring this.

9 MS. BANKS: Okay, Mr. Chair.

10 CHAIRMAN BAEZ: Commissioner Davidson, I'm sorry, go  
11 ahead.

12 COMMISSIONER DAVIDSON: Well, I was just going to  
13 say, couldn't staff hold off and issue one sort of consolidated  
14 order once this item, part of which has been deferred, is  
15 finally resolved?

16 CHAIRMAN BAEZ: Yeah, I'm not sure that I'm seeing --

17 COMMISSIONER JABER: She just needs a motion.

18 CHAIRMAN BAEZ: -- the difficulty in that. Do you  
19 need a --

20 COMMISSIONER JABER: So moved.

21 CHAIRMAN BAEZ: -- motion not to issue?

22 So moved?

23 COMMISSIONER JABER: So moved.

24 CHAIRMAN BAEZ: Is it seconded?

25 COMMISSIONER DAVIDSON: Second.

1 CHAIRMAN BAEZ: Seconded. All those in favor say  
2 "aye."

3 (Simultaneous affirmative vote.)

4 CHAIRMAN BAEZ: So we're holding off on Issue 2.

5 MS. BANKS: Thank you, Mr. Chairman.

6 CHAIRMAN BAEZ: Thank you all. Issue 4, just to get  
7 it straightened out.

8 COMMISSIONER JABER: Move.

9 COMMISSIONER DAVIDSON: Second.

10 CHAIRMAN BAEZ: There's a motion.

11 COMMISSIONER JABER: What should the motion be,  
12 Ms. Banks, that this docket should remain open pending staff's  
13 recommendation and final decision by the Commission?

14 MS. BANKS: That is correct.

15 CHAIRMAN BAEZ: That sounds like a good motion.

16 COMMISSIONER DEASON: Second.

17 CHAIRMAN BAEZ: And Commissioner Deason seconds. All  
18 those in favor say "aye."

19 (Simultaneous affirmative vote.)

20 CHAIRMAN BAEZ: Thank you all. We are adjourned.

21 (Agenda Item Number 4 concluded at 1:40 p.m.)

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1 STATE OF FLORIDA )  
2 COUNTY OF LEON )

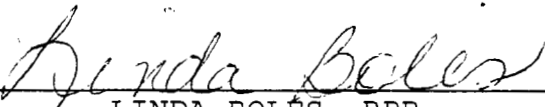
CERTIFICATE OF REPORTER


3  
4 WE, LINDA BOLES, RPR and TRICIA DeMARTE, RPR,  
5 Official Commission Reporters, do hereby certify that the  
6 foregoing proceeding was heard at the time and place herein  
7 stated.

8 IT IS FURTHER CERTIFIED that we stenographically  
9 reported the said proceedings; that the same has been  
10 transcribed under our direct supervision; and that this  
11 transcript constitutes a true transcription of our notes of  
12 said proceedings.

13 WE FURTHER CERTIFY that we are not a relative,  
14 employee, attorney or counsel of any of the parties, nor are we  
15 a relative or employee of any of the parties' attorneys or  
16 counsel connected with the action, nor are we financially  
17 interested in the action.

18 DATED THIS 6th DAY OF MAY, 2004.

19   
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